IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BYRON H. LAMPKIN, Plaintiff, v. WILLIAM S. COHEN, SECRETARY DEPARTMENT OF DEFENSE, Defendant.	:	CIVIL ACTION NO. 00-CV-657

MEMORANDUM

ROBERT F. KELLY, J. OCTOBER , 2000

Before this Court is the Motion for Summary Judgment filed by Defendant, William S. Cohen, Secretary of the Department of Defense ("Defendant"). Plaintiff Byron H. Lampkin ("Mr. Lampkin"), an employee of the Defense Industrial Supply Center in Philadelphia, Pennsylvania ("DISC"), brings this action pro se alleging that he was discriminated against because of his race, color and sex or retaliated against when he was not selected for three different job promotions within the DISC. For the reasons that follow, the Motion is granted.

I. BACKGROUND.

Mr. Lampkin, an African American male, is currently an Inventory Manager at DISC. He has held that position at various grades for approximately seventeen years, which is the length of his career at DISC. In 1997, Mr. Lampkin applied for a position as Commodities Business Specialist GS 1101-09 Target 11. He was

informed that although he was qualified for the position, he was not ranked among the best qualified candidates for the position. Accordingly, he was not referred for an interview. His application for the position had been reviewed under Article 13 of the union agreement, the crediting plan, and although he received the maximum number of points for experience, he did not receive sufficient points in performance, education and training categories. Forty-two people were referred for the position of Commodity Business Specialist. Of the forty-two, eight were African American males.

In June of 1997, Mr. Lampkin applied for the position of Customer Liaison Specialist GS-0301-11. Mr. Lampkin was evaluated by a three member panel for this position. Again, he was ranked as qualified for the position but not among the best qualified candidates. He was not referred for an interview. However, before an individual was selected for the position, the position was canceled, and no one actually obtained the position. Nonetheless, Mr. Lampkin complains that his score in the experience category, 40 out of 60, was unfair and was based upon race, color, sex and/or retaliation for his having filed an EEO complaint concerning the first position. The three people who made up the panel, two of whom were African American males, denied that their decision was based upon race, color, or sex. They also claimed not to have been aware of Mr. Lampkin's

previous EEO complaint, and that they had not retaliated against him.

In September of 1997, Mr. Lampkin applied for the position of Supply Management Specialist GS-2003-09 Target 11. He was referred for an interview for this position. He does not object to the ranking process that was employed in connection with this position, even though it was the same ranking process that was used in connection with the two previous positions, and was governed by Article 13. Mr. Lampkin was interviewed by a Mr. Buckman for approximately forty-five minutes, but does not remember what questions were asked. Five people were selected for this position, three black females and two white males. Mr. Lampkin asserts that he was discriminated against because he believes that the two white males who were selected for the position were less qualified than him. Mr. Buckman testified in his affidavit that he did not the consider race, color or sex of any of the candidates in making his selections, but rather focused on each applicant's answers to job-related questions.

Mr. Lampkin filed this pro se Complaint on February 4, 2000. The Complaint asserts an undefined claim of discrimination without citing to any statute or law which is alleged to have been abridged. However, because Mr. Lampkin claims the discrimination was based on his race, color or sex, we will assume that he is asserting a disparate treatment claim under

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e et seq. ("Title VII"). Moreover, because he complains that the selection process itself is discriminatory, we will assume that Mr. Lampkin is also asserting a claim of disparate impact under Title VII. Finally, Mr. Lampkin appears to be asserting a theory that he was denied the promotions in retaliation for his EEO activity. He seeks a promotion to an unspecified position of Grade GS-11, retroactive pay from the time the discrimination occurred, and $25,000 punitive damages for "mental anguish." (Compl. at ¶ 4).

Discovery having been completed, Defendant filed this summary judgment motion on August 14, 2000. Mr. Lampkin did not respond to this motion. By Order dated September 26, 2000, this Court directed Mr. Lampkin to file a proper response. Apparently in an attempt to comply with this Court's Order, Mr. Lampkin submitted his own Motion for Summary Judgment on October 5, 2000.[1] We will treat Mr. Lampkin's Motion as a response to Defendant's Motion.

II. STANDARD OF REVIEW.

While pro se complaints are entitled to liberal construction, the plaintiff must still set forth facts sufficient to survive summary judgment. Shabazz v. Odum, 591 F. Supp. 1513

[1] Mr. Lampkin failed to file this motion with the Clerk of Court. It was officially filed on October 10, 2000.

(1984)(citing King v. Cuyler, 541 F. Supp. 1230, 1232 n.3 (E.D.Pa. 1982)). "Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[2] Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the

[2] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D.Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION.

In order to establish a claim of disparate treatment under Title VII, a plaintiff must show that he is a member of a protected class and was qualified for an employment position, but that he was either not hired for that position or was fired from it "under circumstances that give rise to an inference of unlawful discrimination." Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107 (3d Cir. 1996)(quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate one or more legitimate, non-discriminatory reasons for its employment decision. Id. If one or more such reasons are proffered, the presumption of discrimination created by the prima facie case is dispelled, and the plaintiff must prove that the employer's proffered reason or reasons was pretext and that the real reason for the employment decision was discriminatory. Id.

In order to establish a claim of disparate impact discrimination under Title VII, a plaintiff is required to demonstrate that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern.

Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 798 (3d Cir. 1991)(citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)). Moreover,

> [t]he evidence in these disparate impact cases usually focuses on statistical disparities....A comparison between the racial composition of those qualified persons in the relevant labor market and that of those in the jobs at issue typically forms the proper basis for the initial inquiry in a disparate impact case. Once the plaintiffs have succeeded in establishing a prima facie case of disparate impact, the focus shifts to a business justification for continued use of the challenged practice which the employer may offer. The employer bears the burden of production with respect to whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. Of course, the burden of persuasion with respect to business justification remains with the plaintiffs. Should the plaintiffs be unable to discredit the legitimate business justification asserted, they may, nonetheless, prevail, where they are able to suggest a viable alternative to the challenged practice which has the effect of reducing the disparate impact and the employer refuses to adopt the alternative.

Id. (internal citations and quotations omitted).

To establish a claim of retaliation under Title VII, a plaintiff must show that: (1) he engaged in a protected activity; (2) his employer took an adverse employment action after or at the same time as the employee's protected activity; (3) there was a causal link between the protected activity and the adverse action. Williams v. Pennsylvania State Police, 108 F.Supp.2d 460, 465 (E.D.Pa. 2000)(citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000)).

A review of Mr. Lampkin's complaint, response to

Defendant's summary judgment motion and deposition reveals that he has failed to produce any evidence to support his allegations.[3] Although he insists that he was not promoted based on his race, color or sex and discriminated against in retaliation for his EEO activity, he cannot identify any individual who was responsible for the alleged discrimination. He insists merely that "management" was responsible. When asked repeatedly who discriminated against him in connection with the three jobs at issue in this case, Mr. Lampkin replied only "People. The rating system. The people who knows (sic) that I do a good job, the management, and everybody that's been over me down through the years." (Lampkin Dep. at 91). When asked for specific names of individuals, Mr. Lampkin replied that he would "rather not say," or does not remember. Id. at 84-85.

Moreover, with regard to the first position, when asked to provide any evidence that he was discriminatorily not selected for the first position, Mr. Lampkin replied only:

> A. When I look at the Agency, when I look at the people in my section, when I look at people within the building, when I look at my qualifications, when I look at Article 13, and when I look all around me and when I see that the Agency withholds evidence and would not allow me to see who they selected, their performance appraisals and education, yes, there's plenty of evidence.

[3] Mr. Lampkin's three and a half page response to this motion merely reiterates the allegations contained in his one and a half page complaint and discussed in his deposition.

Q. Is there anything else that you can think of?

A. No, not right offhand.

Id. at 31. Further, while Mr. Lampkin claims that the rating system discriminates against African-American men, and that therefore he is the subject of disparate impact discrimination, out of the forty-two applicants referred for interviews for this position, eight of them (nineteen percent) were African American males. According to the NAACP Federal Sector Task Force report dated October 23, 1998, upon which Mr. Lampkin relies in support of his claims, the DISC task force for Fiscal Year 1997 was only eight percent African American male.[4] As such, Mr. Lampkin has failed to establish that the rating system at issue had an adverse impact on the African American males who were referred for interviews for this position.

With regard to the second position, this position was cancelled and therefore was never obtained by any individual. Nine of the thirty-two people who were referred for interviews for this position were African American, and four of them were male. Nonetheless, Mr. Lampkin claims that his evaluation by the three member panel for this position was discriminatory. The only "evidence" that Mr. Lampkin cites to in support of this

[4] Mr. Lampkin has provided no information concerning the applicant pool for this job, and the NAACP Federal Sector Task Force report is the only "evidence" he has referenced which concerns the makeup of the work force at DISC.

allegation is that he believes he was given low scores in retaliation for having complained about not being selected for the first position. (Lampkin Dep. at 40). He provides no evidence to rebut the panel members' assertions that they were unaware that he had filed a previous complaint. Id. at 38. He claims that although the three individuals who formulated his scores in evaluating him for this position, two of whom were black males, "had nothing to do with [the discrimination]", they were given orders to discriminate against him by "management." Id. at 35. When asked for specific evidence supporting this allegation, Mr. Lampkin asserted only that "It's all there in black and white. It's retaliation for me having a complaint. Okay?" Mr. Lampkin concedes that he has no evidence to support this claim other than the fact that he believed his scores were too low. Id. at 36-37.

Finally, with regard to the third position, Mr. Lampkin does not believe that the referral process was discriminatory, because he was deemed qualified for and referred for an interview. Id. at 45. Two white males and three African American females were selected for this position. However, he claims he was retaliated against because he is a black male, since the two white males whom he believes were less qualified were selected for the position. At no time during the interview did anyone mention Mr. Lampkin's race, sex or color. Id. at 54.

Mr. Lampkin's only support for his claim with regard to this position is that his division chief discriminated against him by failing to "put in a good word" for him and instead "saying nothing." Id. at 87, 86. When asked for evidence that his division chief had in fact failed to support him, Mr. Lampkin replied, "Because it's obvious. Everything is right in my packet." Id. at 88.

Moreover, with regard to his retaliation allegations in connection with this position, Mr. Lampkin has again failed to provide any evidence that any of the relevant decision-makers were even aware of his EEO activity, or the identities of the members of "management" who were directing them to retaliate against him. Rather, the only evidence that Mr. Lampkin has offered is the mere fact that he was not selected. Id. at 57.

In attempting to survive a summary judgment motion, the non-moving party must "raise more than a mere scintilla of evidence in its favor." Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986)). When opposing a summary judgment motion, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions. Id. (citing Celotex Corp., 477 U.S. at 325). Moreover, "[u]nsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence." Forsyth v. Barr, 19 F.3d

1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994). In the instant case, as illustrated above, Mr. Lampkin's claims are based solely upon his subjective suspicions that he was discriminated against by "management" because he was not part of the "good old boy system." He has produced no specific evidence to support his claims, nor has he even identified any individuals who were responsible for the alleged discrimination. As such, his claims cannot survive summary judgment, and are therefore dismissed.

An appropriate Order follows.